

**Before the
Copyright Royalty Board
Library of Congress
Washington, D.C. 20559-6000**

**In re Notice of Inquiry Regarding
Categorization of Claims for Cable or
Satellite Royalty Funds and Treatment
of Ineligible Claims**

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Docket No. 19-CRB-0014-RM

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

March 16, 2020

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rather than by claimant groups.” Notice at 71853. They further ask what impact a redefinition of the Categories to be content-based would have on the cost and efficiency of the distribution proceedings or on the likelihood of settlements. *Id.* at 71853-854.

In the Comments below, NAB demonstrates why the Categories should continue to be based on claimant groups rather than program content, and that a shift to content-based Categories would have a very substantial negative impact on the cost and efficiency of the proceedings and on the likelihood of settlement.

Second, the Judges request comment on whether they should reverse the “unclaimed funds” approach to Allocation Phase determinations that was adopted in the very first cable royalty distribution proceeding and has been applied in every distribution proceeding since. Notice at 71854. They further ask what impact such a change would have on the cost and efficiency of the distribution proceedings or on the likelihood of settlements. *Id.*

In the Comments below, NAB demonstrates that the “unclaimed funds” approach is directly aligned with the fundamental “relative marketplace value” criterion by which the Judges reach their Allocation Phase determinations, that intra-category re-apportionment of royalties for unclaimed programs is justified, and that reversing the “unclaimed funds” approach would have a very substantial negative impact on the cost and efficiency of the proceedings and on the likelihood of settlement.

I. ALLOCATION PHASE CATEGORIES SHOULD BE BASED ON CLAIMANT GROUPINGS, NOT PROGRAM CONTENT

A. Claimant-Based Categories Necessarily Follow From the Fundamental Purpose of the Statutory License

Congress's central purpose in enacting the cable compulsory license was to establish an efficient substitute for individual license negotiations. Congress found "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 94-1476 (1976), at 89; *see* *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 602, 603 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (June 30, 1988) (Congress adopted the Section 111 statutory license "to address a market imperfection" due to "transaction costs accompanying the usual scheme of private negotiation . . ."). The compulsory license was enacted in order to avoid the inefficiency of requiring license negotiations with every program owner.

Thus, a key premise of Section 111 is that it operates in place of a private market system in which program owners would otherwise individually negotiate and enter royalty-bearing license agreements for the cable transmission of their programs.⁵ Accordingly, the central purpose and focus of cable royalty distribution proceedings must be to allocate the royalties

⁵ This premise applies whether the "hypothetical market" the compulsory license replaces is conceived as involving direct licensing to the cable operator or indirect licensing through a broadcast station. *See* *Distribution of Cable Royalty Funds*, Docket No. CONSOLIDATED 14-CRB-0010-CD (2010-2013), 84 Fed. Reg. 3552 (Feb. 12, 2019) ("2010-2013 Cable Determination"), at 3555.

among the owners/claimants whose programs were actually retransmitted by cable operators, not simply to allocate relative marketplace value across types of program content.⁶

The very first cable royalty determination by the Copyright Royalty Tribunal (“CRT”) defined the task under Section 111 as “the allocation of royalties to specific groups of claimants.”⁷ And all Allocation Phase proceedings and settlements since 1978 have followed this claimant-based allocation structure, because the allocation and distribution of royalties to claimants is the central and only purpose of these proceedings.

The Copyright Act expressly authorizes claimants to agree among themselves to receive royalty payments through a common agent. 47 U.S.C. §111(d)(4)(A). The particular Categories in these cable distribution proceedings developed voluntarily over time along natural lines of industry affiliation and general program similarities.⁸ The resulting aggregation of many hundreds of separate annual claims into seven affinity-based claimant Categories produces

⁶ 17 U.S.C. §§111(d)(3), 801(b)(3)(B).

⁷ 1978 Cable Royalty Distribution Proceeding, 45 Fed. Reg. 63026, 63027 (Sep. 23, 1980) (“1978 Determination”).

⁸ The principal claimant group representatives currently include the Motion Picture Association of America (Program Suppliers), the professional sports leagues and NCAA (Joint Sports Claimants), the National Association of Broadcasters (Commercial Television Claimants), Public Broadcasting Service (Public Television Claimants), the Performing Rights Organizations (Music Claimants), the Canadian Broadcasting Corporation (Canadian Claimants Group), and National Public Radio (NPR). The Settling Devotional Claimants are composed of claimant entities that produce and syndicate programming within the Devotional Claimants category definition. All of these representative entities or organizations, in their roles in the Allocation Phase of the proceedings, agree to represent all claimants that fall within their respective category definitions, including claimants that are not members of the representative organization. Order Regarding Discovery, Consolidated Proceeding No. 14-CRB-0010-CD (2010-2013) (Jul. 21, 2016) at 4-5.

tremendous efficiencies in these distribution proceedings.⁹ If these Category representatives did not voluntarily continue to expend substantial resources in gathering data, identifying all claimants within their Category, establishing their respective Allocation Phase shares, and distributing all of their category's royalties, those tasks would otherwise fall to the Board.

But if the Categories were to be redefined in this rulemaking proceeding under another criterion, such as program content, the Category representatives could no longer perform these same valuable roles efficiently. The effect would be either to mandate that claimants associate with different Allocation Phase category representatives, impinging on their right to choose their common agent under Section 111(d)(4)(A), or to require their agreed-on claimant group representatives to negotiate or litigate new disputes for the first time with other claimant group representatives regarding the royalties for programs that have been reassigned to different content-based categories.

The Categories have been criticized as being the result of a mere "stipulation" among the participants, without any basis in law or in CRT, CARP, or CRB determinations.¹⁰ But the

⁹ As a comparison, the Canadian cable royalty distribution process, though different in several ways from the Section 111 system, is also implemented through the participation of a finite number of similarly claimant-based category representatives. See <https://cb-cda.gc.ca/societies-societes/index-e.html> (last visited 3/3/2020). The Collective Societies for cable and satellite "Retransmission" royalties (along with an abridged description of who they represent) include Border Broadcasters (U.S. television stations), Canadian Broadcasters Rights Agency (Canadian stations and commercial networks), Canadian Retransmission Collective (independent producers and educational TV producers), Canadian Retransmission Right Association (CBC, ABC, CBS, NBC), Copyright Collective of Canada (U.S. producers and distributors of movies and entertainment programming), Direct Response Television Collective (producers of infomercials), FWS Joint Sports Claimants (NHL, CFL, NBA, NFL), Major League Baseball Collective of Canada (MLB), and Society of Composers, Authors, and Music Publishers of Canada (owners of performing rights in music).

¹⁰ See Notice at 71852, quoting Judge Sledge's statements in the nature of dicta during a colloquy in the 2000-2003 Phase I Cable Royalty Distribution Proceeding (which did not require application of the Category definitions, since it was limited to a determination of how the

comprehensive and mutually exclusive Categories, agreed upon by all proponent Allocation Phase claimant group representatives, have the force of law under 47 U.S.C. §111(d)(4)(A). Moreover, the scope and detailed definitions of the respective Categories were in fact established in part through CRT determinations.¹¹

As the Judges' Notice explains, only a single Distribution Phase party opposed the use of the claimant-based Categories in Allocation Phase proceedings. Notice at 71853. This commenter appears to have been motivated by having failed to fit a program it represented into a Category whose definition it did not satisfy, which the commenter (wrongly) believed had deprived it from receiving a higher royalty payment for the program.¹² But the Judges have

Canadian Claimants' share should be determined, Distribution of the 2000-2003 Cable Royalty Funds, 75 Fed. Reg. 26798, 26799 (May 12, 2010)). The statements, moreover, were not entirely accurate, as demonstrated below.

¹¹ For example, in the 1984 Phase II Proceeding, the CRT first issued an advisory ruling that added more details in the Program Suppliers and CTV category definitions, then modified those revised definitions further in response to a request from the parties. 1984 Cable Royalty Distribution Proceeding, 52 Fed. Reg. 8408, 8416 (Mar. 17, 1987). The CRT applied the modified definition to the 1984 distribution proceeding, and concluded: "***we now state that the modification is adopted for subsequent proceedings as well,***" without referring to or requiring any future stipulation of the parties. *Id.* (emphasis added). The CRT went on to adopt an additional modification of the two categories based not on a request by the parties but on evidence it had received regarding new types of station-produced programs that were "comprised predominantly of syndicated elements." *Id.*

See also 1978 Determination, 45 Fed. Reg. at 63042 (Sept. 23, 1980) (combining 8 claimant representatives into 5 shared-interest Phase I categories); 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9879, 9897 (Mar. 8, 1982) (identifying 7 Phase I categories); 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9561 (Mar. 7, 1983) (creating a separate Phase I category for syndicated Devotional program claimants); *1983 Cable Royalty Distribution Proceeding*, 51 Fed. Reg. 12792, 12792 (Apr. 15, 1986) (noting that the claimants had formed 8 Phase I claimant groups as authorized by Section 111(d)(5)(A)).

¹² Multigroup Claimants' Comments on Claimant Category Definitions and Proposed Modification, Docket Nos 16-CRB-009 CD (2014-17), 16-CRB-010 SD (2014-17), filed Apr. 19, 2019, at 13-15.

requested comment only on the commenter's unsupported assertion¹³ that the Categories are "not aligned with the way in which system operators decide to retransmit broadcast television signals." Notice at 71853.

While the Judges express concern about whether the Categories reflect CSO perceptions, evidentiary approaches such as regression studies, which are based on data reflecting actual CSO choices of which distant signals to carry, do not raise any such concern. And even CSO surveys are successful in measuring relative value.¹⁴ Moreover, the "dominant impression" conveyed by a properly constructed set of category definitions reasonably identifies the Categories. Notwithstanding their reliance on claimant groupings, the nature of programs included within the Categories are largely coherent.¹⁵

B. Redefining the Claimant-Based Categories to be Content-Based Would Have Tremendous Negative Consequences for the Cost and Efficiency of the Proceedings and for the Likelihood of Settlements

Replacing the Categories with content-based categories is unnecessary and would not allow for easier or more accurate allocation determinations. The programs on the television stations that cable operators select and pay for number in the tens of thousands every year.¹⁶ Any attempt to aggregate them into content-based categories for allocation purposes would itself

¹³ *Id.* at 13.

¹⁴ *See* 2010-2013 Cable Determination at 3591 & n. 146 ("the Judges find that the surveyed cable system executives were sufficiently familiar with the compensable content on the signals their respective systems transmit," particularly in light of the decades-long consistent use of the same Category definitions in these proceedings).

¹⁵ *See* pages 9-11 *infra*. For example, the predominant program types within the CTV category are News and Public Affairs, even though the category includes smaller amounts of other content types and even though other categories also include smaller amounts of News and Public Affairs programs.

¹⁶ *See* Exhibit B (Declaration of Christopher J. Bennett PhD)

be difficult and contentious. But more importantly, using content-based categories would choke the system and make efficient allocation and distribution decision-making essentially impossible.

1. Creating Acceptable Content-Based Categories Would Not be Possible

The current Categories are both comprehensive and mutually exclusive. In order for a new set of content-based categories to provide a comparable basis for allocating all of the cable royalty funds, it would similarly need to reflect all content types represented among all the programs cable operators actually pay to retransmit. Moreover, program types retransmitted by cable operators may change over time, which would require periodic readjustments of the categories.¹⁷

The customized creation of an entirely new taxonomy of comprehensive and mutually exclusive program content types solely for use in the Allocation Phase hearings would require substantial effort, and at the end of the process might still be subject to challenge as unsupported or arbitrary. If the Judges were instead to attempt to incorporate a market-based typology, the results could also be subject to possible challenge. For example, Program Suppliers witness Dr. Gray's analysis in the 2010-2013 cable royalty distribution proceeding used 30 different program "Type" designations (including "Other") that were developed by Gracenote/Nielsen.¹⁸

The lone commenter's suggestion that only one category – "sports" – should be newly defined based on content¹⁹ while the others would remain claimant-based would distort any relative value evidence by which the new category was compared with the others, and would be

¹⁷ See 1984 Cable Royalty Distribution Proceeding, 52 Fed. Reg. 8,408, 8,416 (Mar. 17, 1987)(modifying Program Suppliers category to add new genre of music video shows).

¹⁸ See Exhibit C (Allocation Hearing Exhibit 6018, Docket No. CONSOLIDATED 14-CRB-0010-CD (2010-2013), Table C-8, at 47-48 (Gray WDT) (listing Program Types)).

¹⁹ Notice at 71853.

essentially unworkable. Moreover, the Gracenote Program Type designations include “Playoff Sports,” “Pseudo Sports,” “Sporting Event,” “Sports Anthology,” “Sports-Related,” and “Team vs. Team” categories.²⁰ Combining all these types into a single new Allocation Phase “Sports” category would not necessarily improve the reliability or accuracy of the relative market value determination.²¹ But the alternative -- including each of them as a separate content-based category in order to reflect Gracenote’s market-based typology -- would move the proceedings farther away from, not closer to, the fundamental statutory purpose of making the distribution proceedings an efficient substitute for individual program owner license negotiations.

Indeed, evidence shows that the Categories themselves, because the claimant groups are affinity-based, are already broadly associated with recognizable program types. The “dominant impressions” conveyed by the current Category definitions generally match up with the predominant types of programs represented by the respective Claimant Category representatives.²² This is further illustrated by rebuttal testimony submitted by CTV witness Christopher J. Bennett, PhD in the 2010-2013 Satellite Proceeding, which was settled before hearing. In his sworn submission, Dr. Bennett compiled the programs included by Program

²⁰ See Exhibit C, Table C-8, at 48.

²¹ Programs within the Joint Sports Claimants’ category, which are limited to “live telecasts of professional and college team sports” are readily distinguishable from other types of sports programs for relative marketplace value purposes, and combining them with all manner of other sports-related programs could be expected to muddy the value determination. Indeed, Program Suppliers witness Dr. Horowitz presented a study in the 2010-2013 Cable Royalty Distribution Proceeding that purported to show that “other sports” were valued at roughly 60% to 80% less than live professional and college team sports. See Allocation Hearing Exhibit 6012, Docket No. CONSOLIDATED 14-CRB-0010-CD (2010-2013), Table 3.2, at 16 (Horowitz WDT) (reporting results of survey).

²² See Oral Testimony of James Trautman, Docket No. 14-CRB-0010-CD (2010-2013), Feb. 14, 2018, at Tr. 280-283.

Suppliers witness Jeffrey S. Gray, PhD, in his “viewing” study, by the Gracenote Program Type to which they were assigned and by the Allocation Phase Category to which Dr. Gray assigned them.²³ As is shown there, the CTV category, which represents programs created by or for U.S. commercial television stations and aired in their home markets, consists predominantly of news programs, even though it also includes lesser numbers of station-produced public affairs, sports-related, and other programs.²⁴ Similarly, the syndicated programs represented by the Devotional Claimants are mostly religious, notwithstanding lesser numbers of talk shows, news, and music shows.²⁵ The Joint Sports Claimants category includes mostly “Team vs. Team” and playoff sports, as well as lesser numbers of “sporting events.”²⁶ And the Program Suppliers’ category is most heavily comprised of syndicated programs, talk shows, and “Other” programs (presumably including infomercials, which are not assigned a separate Type by Gracenote).²⁷ Generally fewer than 3% of Program Suppliers’ programs appear to have fallen within any of the “sports” designated types.²⁸ As can be seen from the charts, CTV has by far the largest number of News programs, even though other categories also may include some News program, and the same

²³ See Exhibit D (Rebuttal Testimony of Christopher J. Bennett, PhD, Docket No. CONSOLIDATED 14-CRB-0011-SD (2010-2013), Figures 12 & 45-47 (Bennett 2010-2013 Satellite WRT) (analyzing Program Types against Claimant Categories). The analysis is somewhat limited, because fewer stations are retransmitted as satellite distant signals than as cable distant signals, and no PTV or Canadian stations are carried by satellite, but the general patterns it illustrates are relevant in the cable proceedings as well.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See Id.*

predominance is true for sports game telecasts for the JSC category, Religious programs for the Devotional category, and Syndicated and Talk Show programs for the Program Suppliers category.²⁹

In sum, taking the largest two or three Gracenote Types for each Category and calculating the shares they represent of the total number of programs within each Category, there are clear correlations between Claimant Categories and program Types³⁰:

Percentage Shares of Largest Program Types by Allocation Phase Category, on 2010-2013 Satellite-Carried Distant Signals					
Category	Largest Program Types	2010	2011	2012	2013
JSC	Playoff + Team v. Team	99.9%	99.3%	99.1%	99.7%
CTV	News + Public Affairs	88.9%	90.7%	89.8%	90.1%
Devo	Religious + Talk Shows	96.3%	97.7%	97.9%	96.5%
PS	Syndicated + Talk Shows + Other	70.2%	70.2%	70.9%	70.7%

Because of the generally corresponding program types in each Category, the cable operator survey evidence presented in the Allocation Phase proceedings would not necessarily be improved by replacing the claimant-based Categories with newly created content-based categories. And such a modified survey would be less directly applicable to determining Allocation Phase awards to the participating Claimant Groups.

The other two of the principle methodologies considered by the Judges, of course, do not rely on program content types at all. Both the regression analysis presented by CTV and the “viewing”/regression analyses presented by Program Suppliers are based on categorizing all

²⁹ See *Id.*

³⁰ Source: Exhibit D.

programs (or in the case of the “viewing” study, sample programs) into the proper claimant-based categories, and would be rendered less useful in determining the relative shares of the Allocation Phase Claimant Groups if instead they were required to measure the relative value of much more numerous content-based categories, regardless of Claimant Category.

2. Use of Content-Based Categories Would Add Unnecessary Complexity, Delay, Cost, and Controversy to the Allocation Phase Proceedings

Redefining the Allocation Phase Categories to be content-based would add a new layer of Distribution Phase complexity by requiring an interim “next step” allocation among the current voluntary Allocation Phase Claimant Groups³¹ before turning to the resolution of any Distribution Phase disputes between individual claimants and Claimant Group representatives.³²

Allocating royalty shares in the first instance across program content types would sweep multiple claimant groups into each content category.³³ The “next step” would be a further allocation of each Allocation Phase award among the programs represented by the different claimant groups within the category. Assuming, as seems reasonable, that many such further allocations would be disputed, this “next step” would require an entirely new set of allocation

³¹ For example, an allocation to a newly redefined “sports” category that combined all Gracenote program “Types” that refer to sports would apparently encompass programs currently represented by at least JSC, CTV, Program Suppliers, and even Devotional categories. *See* Exhibit D. It could also encompass programs in the Canadian Claimants Group and PTV categories. And the re-allocation of this new Allocation Phase “sports” award among the respectively distinctive types of sports programs represented by all these Claimant Groups would itself be no easy task.

³² Forced reconstitution of claimant groups would violate the statute. But if claim reassignments were part of what would be contemplated as part of the “next step” proceedings – e.g., requiring all owners of any “sports” programs to receive their distributions through the JSC representative rather than their agreed claims representative – they can be expected to be followed by a number of very substantial multi-party Distribution Phase disputes that do not exist under the current system but that would need to be resolved.

³³ *See* Exhibit D.

proceedings before the Judges, each with a separate relative marketplace value determination. For example, the Judges might be called upon to determine the relative value of live professional and collegiate sports games represented by the Joint Sports Claimants versus NASCAR auto races, professional wrestling, and figure skating broadcasts represented by Program Suppliers³⁴ versus a pre- or post-game show or local coach's show represented by CTV,³⁵ versus Canadian Winter Olympics coverage, "CBC Sports," or "Les Nouvelles du Sport" programs represented by the Canadian Claimants Group³⁶ versus any sports-related programs that might air on PTV. Similar overlaps would require resolution of disputes in other content-based categories.³⁷

While each of the current claimant-based Categories has developed and adopted a methodology for internally distributing royalties to its members that is accepted by the claimants of those programs, it is reasonable to expect that those internal distribution methodologies differ from each other, and would be separately asserted as competing approaches in a disputed "next step" Allocation Phase hearing. Depending on which programs and claimant group representatives were included in each content category, the results of those determinations could well be different. After the allocation of the award to the new content-based category was thus re-allocated, each claimant group representative would then be required to distribute the separate

³⁴ See Allocation Hearing Exhibit 6012, Docket No. CONSOLIDATED 14-CRB-0010-CD (2010-2013), at 3, 5, 10, 15, 26, 28, 30, 32, 33, 35, 37, and 39 (Horowitz WDT) (explaining the purpose of and illustrating the inclusion of "other Sports" examples in survey instruments).

³⁵ Allocation Hearing Exhibit 2003, Docket No. CONSOLIDATED 14-CRB-0010-CD (2010-2013), at 2-3 (Burdick WDT)(listing examples of programs typically produced and aired by commercial television stations).

³⁶ See, e.g., Allocation Hearing Exhibit 4001, Docket No. CONSOLIDATED 14-CRB-0010-CD (2010-2013), Exhibits CCG-1-B, Page 11, CCG-1-E, Pages 1, 20 (Boudreau)(setting out sample programs and program schedules on Canadian stations).

³⁷ See Exhibit D.

content-based awards to the various claimants within its group. If the results of the “next-step” hearings changed the basis for allocating the relative value of some but not all of the programs included within the group, or were generally inconsistent with the internal distribution methodology that had been accepted by and applied to represented claimants, new Distribution Phase disputes would be likely.³⁸

In short, the process for replacing the claimant-based Allocation Phase Categories with content-based program categories would itself be difficult and contentious. Moreover, to be useful, the content-based definitions would have to be mutually exclusive and comprehensive, which would naturally result in identifying dozens of Allocation Phase categories whose shares would all have to be separately determined. But even if the Judges were able to combine program content types into as few as seven clearly comprehensible and distinguishable program categories among which it could allocate all of the royalties, the “next step” re-allocation litigation would be complex and time-consuming, and would likely further result in new Distribution Phase disputes within the groups. With the cross-cutting need for most if not all of the Claimant Groups to engage in multiple brand-new “next step” proceedings, settlement would be highly unlikely for the foreseeable future.

The delay and cost of replacing the claimant-based Categories would be substantial, and could not possibly be justified by any imagined benefits for the allocation process. Making such

³⁸ For example, although the lone commenter supporting content-based categories asserts that CSOs would not consider sports such as golf, ice skating, and boxing differently from live professional and collegiate team events, Multigroup Claimants’ Comments on Claimant Category Definitions and Proposed Modification, Docket Nos 16-CRB-009 CD (2014-17), 16-CRB-010 SD (2014-17), filed Apr. 19, 2019, at 10, the evidence suggests that such sports would indeed be valued differently. *See* note 21 *supra*. If both types were included within a single Allocation Phase award, it is highly likely that the further distribution of that award would be disputed.

a change would be antithetical to the fundamental purpose of the statute, because it would make the process far more complex, costly, and inefficient, and would be antithetical to the statutory provision that allows claimants to voluntarily agree on combining their claims and being represented by a common agent.

II. PROGRAM-BY-PROGRAM CLAIM STATUS SHOULD NOT AND CANNOT BE CONSIDERED AT THE ALLOCATION PHASE

The Judges seek comment on whether to change the treatment, in the Allocation Phase,³⁹ of royalties for retransmitted programs that are “unclaimed because a filed claim is invalid or not validly represented in a distribution proceeding (invalid claims).” Notice at 71854. The “unclaimed funds” ruling of the Copyright Royalty Tribunal (CRT) that the Judges propose to revisit, however, was not limited to or even necessarily focused on the impact of “invalid claims,” but instead on the impact of missing claims.⁴⁰

The practice of allocating funds to categories as if all eligible claimants had filed valid claims is efficient, predictable, and essential to settlement, and completely aligned with the relative marketplace value criterion by which the Judges make their Allocation Phase determinations. If, contrary to this longstanding and universally followed approach, unclaimed funds were allocated to each individual claimant in proportion to its share of the *entire* royalty fund pool, the basic system of making Allocation Phase determinations among a limited number

³⁹ There is no question that royalties should not be awarded in the Distribution Phase for programs as to which a valid claim was not filed.

⁴⁰ The CRT was responding to factual assertions that “not all eligible claimants had submitted claims.” 1978 Determination, 45 Fed. Reg. at 63042. The CRT concluded that “the Phase I allocations to categories of claimants should be made as if all eligible claimants in each category had filed valid claims.” *Id.*

of overarching categories would be rendered pointless -- leading to inefficiency and unpredictability, and hampering settlement.

A. The Judges Should Not Depart from the Unclaimed Funds Ruling.

Unclaimed works and invalidly claimed works are of course ineligible to receive any royalties in the Distribution Phase of these proceedings. The question presented in the Notice is instead how such works should be treated in the Allocation Phase, and in particular whether the royalties found attributable to such works should effectively be re-allocated only to other claimants within the same category in which the claims are missing, as the CRT held and as has been followed in every proceeding over the past 40 years, or instead across all other claimants.

1. The Unclaimed Funds Ruling is Compelled by the CSO-Based Relative Marketplace Standard

Unlike the Distribution Phase, the objective of the Allocation Phase is to determine the relative marketplace value of the programs represented by the respective Allocation Phase claimant categories.⁴¹ As the Judges have found, these relative values are derived from the preferences revealed by Cable System Operators' ("CSOs'") selections of the bundles of programs that are broadcast on the stations they choose to retransmit from among those available to them.⁴²

Whether valid or timely claims are properly filed by copyright owners for their programs has no bearing whatsoever on the relative marketplace value of programs actually carried on distant signals that CSOs have already decided to retransmit. CSOs make their carriage decisions as of the beginning of the Accounting Period for which they pay royalties. Claims, by

⁴¹ See, e.g., 2010-2013 Cable Determination at 3555.

⁴² *Id.* at 3555-3556.

contrast, are filed only in July of the year following carriage, up to eighteen months after the carriage decision is made and the royalties are incurred.⁴³ It sometimes happens that a copyright owner eligible to claim royalties for a retransmitted program fails to file a claim by that post-carriage July deadline, or even that a filed claim is found, sometimes years later, to have been invalid or not to have been timely filed.⁴⁴

By making a final determination of Allocation Phase shares based on evidence of the relative marketplace value of all of the programs the cable operators actually retransmitted and paid for, the Judges meet their statutory obligations in accordance with longstanding precedent.⁴⁵ If after such a determination, the royalties allocated to each Category were simply distributed among the claimants within the respective category (effectuating “intra-category re-apportionment,” Notice at 71854, if any programs within the category were not the subject of valid claims), that result would also be consistent with the governing “relative marketplace value” standard.

2. The Intra-Category Redistribution Aspect of the Unclaimed Funds Ruling is Consistent with the Evidence, and Avoids Unjustified Cost, Delay, and Inefficiency

The effect of the Unclaimed Funds approach is to allow royalties that would otherwise have been allocated to programs for which no valid claim has been filed to be redistributed

⁴³ 47 USC §111(d)(4)(A).

⁴⁴ See, e.g., *Universal City Studios, LLP v. Peters*, 402 F.3d 1238 (D.C. Cir. 2005)(affirming District Courts’ decisions in two underlying cases that the separate claims of MGM Studios and Universal for cable royalties for the year 2000 were not timely filed).

⁴⁵ See, 2010-2013 Cable Determination at 3555, *citing* *Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 401-402 (D.C. Cir. May 31, 2005).

among the owners of other programs within the same Category. As discussed above,⁴⁶ the predominant programs within most claimant-based Categories are largely similar in nature to each other and distinguishable from programs in other Categories, thus warranting intra-category allocation of any unclaimed funds.

If instead of allowing this system to continue the Judges were to attempt to re-allocate the royalties for all unclaimed programs to all other claimants in proportion to their respective individual royalties, only one possible approach would appear to be available.⁴⁷ As proposed by MPAA in the 2014-2017 proceeding, overturning the CRT's Unclaimed Funds ruling would be accomplished by first eliminating every program that had no valid claim on file from the categories, and then asking the Judges to determine the relative value to the cable operators of just the programs with valid claims.⁴⁸ The tremendous negative impact such an approach would have on efficiency and the likelihood of settlement is discussed below. But it would also be fundamentally antithetical to the relative marketplace value standard under which Allocation Phase determinations are supposed to be made. For example, the total royalties paid by cable operators to retransmit distant signal programming in the year 2000 did not change, even though a court decided five years later that the claims for all programs supplied by both MGM Studios

⁴⁶ See pp. 9-11 *supra*.

⁴⁷ Trying to determine the value of the unclaimed programs and then to re-allocate that value across all claimed programs would be infeasible, especially as the relevant owners of the unclaimed programs, who would otherwise naturally be expected to seek to prove the value of the unclaimed programs, would be ineligible to receive royalties for them and thus unlikely to participate.

⁴⁸ See Program Suppliers' Responsive Brief Regarding Proposed Claimant Group Definitions, Filed May 3, 2019, Docket 16-CRB-0009-CD (2014-17), at 6-7 & n. 12 (suggesting that the Judges may wish to eliminate the Allocation Phase categories altogether and instead allocate the royalties across all owners of all "eligible" (i.e., claimed) works.

and Universal City Studios, which were estimated to represent over \$10 Million in royalty distributions,⁴⁹ had properly been rejected as untimely by the Copyright Office.⁵⁰ Cable Operators choose to carry, and value, the programs they understand will be on stations when they carry them, without any regard whatsoever for the possibility that the owners of some of the programs they valued and paid for might, years later, receive no share of those royalties.

B. Reversing the Longstanding Unclaimed Funds Ruling Would Add Unnecessary Complexity, Delay, Cost, and Controversy to the Allocation Phase Proceedings, and Would Reduce the Likelihood of Settlement

Reversing the Unclaimed Funds ruling would thus require the commencement of a full claim validity proceeding to determine whether each of the tens of thousands of programs retransmitted during the royalty year in question was covered by a valid claim before the final preparation or presentation of any Allocation Phase evidence.⁵¹ The relevant evidence would be based on events that took place years after the CSO's decision to retransmit a signal, even though those events are unknown to the CSO and have no effect on the royalties the CSO already paid for all the programs it carried, both "claimed" and "unclaimed." For a multi-year consolidated case, such determinations would need to be made separately for each claim year, with the possible result, for example, that a CSO's value-based decision to carry the same signal in two successive years would produce different overall Allocation Phase "relative market values" in

⁴⁹ Metro-Goldwyn-Mayer Studios, Inc. v. Peters, 309 F.Supp.2d 48, 52 (D.D.C. Mar. 24, 2004); Universal Studios LLLP v. Peters, 308 F.Supp.2d 1, 5 (D.D.C. Mar. 24, 2004).

⁵⁰ Universal City Studios LLLP v. Peters, 402 F.3d 1238 (Apr. 8, 2005).

⁵¹ The commencement of this new threshold proceeding might itself be delayed for years if, as was the case for the movie studios in the 2000 Cable Royalty Proceeding, claimant parties were to avail themselves of judicial review of claim rejection determinations by the Board.

the two years if a single copyright owner whose program appeared on the station in both years inadvertently failed to file a timely claim for one of those years.

The threshold free-for-all Allocation Phase claim validation challenges required by this approach would effectively make it impossible to prepare comprehensive quantitative evidence and present it in a timely fashion. A party sponsoring a comprehensive quantitative study would need to assure itself of the claim status of each included program in each year,⁵² and this would encompass the programs of all Allocation Phase participants, not just the sponsoring party. Since filers of cable claims in July each year are not required to identify all (or, indeed, any) specific programs being claimed, there would be no public source that would allow a party to assure that its comprehensive quantitative study covered only programs for which timely claims had been filed.

Under such a cart-before-the-horse regime, the limited Distribution Phase disputes the Judges have been required to resolve in the past could well balloon to include potential disputes over the validity and scope of every single claim in every category, and such disputes would have to be litigated (presumably with discovery into all claims prior to the completion of quantitative evidence by any party) and resolved at the very outset of the Allocation Phase,⁵³ so that the determinations could then be incorporated into each Allocation Phase methodology.

Incorporating such rulings would, however, be difficult, if not impossible, for the methodologies that have been used in prior Allocation Phase proceedings. CSO surveys, for

⁵² For context, the four-year regression study presented by CTV in the 2010-2013 Cable Royalty Proceeding covered 1,239,411 unique program ID's, *see* Corrected Written Direct Testimony of Christopher J. Bennett, Ph.D., filed Apr. 11, 2017, in Docket No. 14-CRB-0010-CD (2010-2013), at 6 Fig. 3.

⁵³ Presumably, disputes based on competing claims to the same program by valid claimants could await resolution until the Distribution Phase.

example, have typically been fielded contemporaneously or shortly after the royalty year in question, and a questionnaire fielded years later that also had to exclude a list of specific programs, which itself differed from year to year, could affect the validity of the results. While comprehensive regression studies could be rerun after the conclusion of the claim validity proceeding, the non-random after-the-fact exclusion of programs from the analysis, especially because those programs were actually selected and paid for by the cable operators, could affect the validity of the results. And the “viewing” studies that have been presented by Program Suppliers in cable proceedings are based on a sample of stations.⁵⁴ Because the number and nature of unclaimed programs could well differ on a non-random basis as between the sampled and unsampled stations in such studies, the reliability of any results based on the sampled stations would be questionable. And the cost of acquiring data on all retransmitted programs rather than just a sample is quite substantial.⁵⁵

Given the impossibility of independently validating the claims covering all retransmitted programs prior to the commencement of a proceeding, it seems unlikely that any party would undertake a costly comprehensive econometric or other quantitative study before the proceeding. Thus, there would likely be no comprehensive quantitative relative value evidence submitted as part of the Written Direct Testimony.

In addition, reversing the Unclaimed Funds presumption would make it extremely difficult, if not impossible, to predict future distribution shares, because the existence and validity of any claim in any year would necessarily have an impact on all other claimants. This

⁵⁴ Allocation Hearing Exhibit 6036, Docket No. CONSOLIDATED 14-CRB-0010-CD (2010-2013), at 11-12 (Gray WDT).

⁵⁵ *See Id.*

unpredictability would be a significant obstacle to settlement, particularly where any one *individual* claimant could drag *all* the other parties into litigation over the specific value and validity of every claim. And parties would face a nearly impossible task of determining prior to completion of the claim validity proceedings whether and to what extent it or any other Category is affected for the royalty year yet to be litigated, and would therefore have much greater uncertainty about whether to settle. These results are deeply contrary to the central purposes of the Section 111 statutory license and these distribution proceedings: efficiency, promotion of settlement, and elimination of transaction costs.⁵⁶

All of the unnecessary but extremely disruptive effects of such a change on the Allocation Phase proceeding have been avoided, of course, since the CRT's decision in its very first distribution determination to treat "Unclaimed Funds" as a Distribution Phase issue rather than an Allocation Phase issue.⁵⁷ For the past 40 years, the established precedents regarding unclaimed funds have promoted predictability, settlement, and efficient resolution of the vast majority of disputes. Indeed, in many categories there have been very few or zero litigated Phase II disputes for the entire history of the cable royalty funds. Those claimants have worked diligently to resolve internal disputes through settlement and apply an agreed-to system for intra-category royalty allocation to eligible copyright owners. The consequence of reversing the Unclaimed Funds ruling would be to put an end to such intra-category agreements and instead force every claim within every category into litigation.

⁵⁶ See *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 612 (D.C. Cir. 1988)(recognizing "the congressional goal of minimizing transaction costs" in enacting Section 111); see also *id.* at 602–03.

⁵⁷ See 1978 Determination, 45 Fed. Reg. at 63042.

Finally, restricting the Allocation Phase category definitions to “Claimed” programs, besides being disruptive and counterproductive, is simply unwarranted. The owners of retransmitted programs for which timely claims are not filed will not receive royalties, either in the vast majority of distributions (made privately and consensually by the Claimant Category representatives following the Allocation Phase determination) or in the distributions directed by the Judges in the relatively tiny number of cases in which they must resolve Distribution Phase disputes.

Conclusion

For these reasons, NAB respectfully recommends that no changes be made to the Allocation Phase Categories or to the definitions that have consistently been applied in cable royalty distribution proceedings. Redefining the Categories to be content-based rather than claimant-based or redefining them to exclude all unclaimed programs for Allocation Phase purposes would be inconsistent with the statute and would subvert the fundamental purpose of Section 111 by radically increasing cost, complexity, and delay and radically reducing any likelihood of settling disputes in these proceedings.

The Judges instead should simply continue the practice they followed in the 2010-2013 Cable Royalty Proceedings, of publishing the Category definitions in a preliminary Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and Scheduling Order. To the extent the Judges conclude that it would be preferable to memorialize the Category definitions in their regulations, they should adopt the Category definitions set forth in Exhibit A.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

By: /s/ John Stewart

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Its Counsel

EXHIBIT A

EXHIBIT A

Descriptions of Agreed Categories of Claimants

Following are non-exhaustive descriptions of the types of programs or other creative works that fall within each of the agreed categories of claimants (Agreed Categories) to which categories the Judges may approve an allocation of cable retransmission royalties.

“Canadian Claimants.” All programs broadcast on Canadian television stations, except: (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports, and (2) programs owned by U.S. copyright owners.

“Commercial Television Claimants.” Programs produced by or for a U.S. commercial television station and broadcast only by that station during the calendar year in question, except those listed in subpart 3) of the Program Suppliers category.

“Devotional Claimants.” Syndicated programs of a primarily religious theme, but not limited to programs produced by or for religious institutions.

“Joint Sports Claimants.” Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except programs in the Canadian Claimants category.

“Music Claimants.” Musical works performed during programs that are in the following categories: Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Public Television Claimants, Devotional Claimants, Canadian Claimants.

“National Public Radio.” All non-music programs that are broadcast on NPR Member Stations.

“Program Suppliers.” Syndicated series, specials, and movies, except those included in the Devotional Claimants category. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music videos, cartoons, “PM Magazine,” and locally-hosted movies.

“Public Television Claimants.” All programs broadcast on U.S. noncommercial educational television stations.

The parties and the Judges intend that these category descriptions define mutually exclusive claimant groups. The Judges will not approve a retransmission royalty distribution from more than one Agreed Category for any one claimed program.

EXHIBIT B

Before the
COPYRIGHT ROYALTY JUDGES
WASHINGTON, D.C.

In the Matter of

**Categorization of Claims for Cable or
Satellite Royalty Funds and Treatment of
Ineligible Claims**

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No. 19-CRB-0014-RM

DECLARATION OF CHRISTOPHER J. BENNETT, PH.D.

March 16, 2020

I, Christopher J. Bennett, Ph.D., declare:

- (1) I am an economist and a Principal of Bates White Economic Consulting in Washington, DC.
- (2) I was asked by counsel for the National Association of Broadcasters to report the number of unique non-network television programs and series that aired on distant signals retransmitted by Form 3 cable systems in one or more years from 2010-2013.
- (3) To perform this analysis, I relied on the same data that I analyzed and produced along with my Written Direct Testimony in the 2010-2013 Cable Royalty Distribution Proceeding. Specifically, I relied on the "parent ID" and title fields available in the comprehensive program data that was provided by FYI Television, Inc. ("FYI") to identify episodic and duplicative content.¹
- (4) To arrive at the number of unique non-network programs and series in each year, I tallied the number of non-network programs remaining in the database after removing (i) all but a single episode within each series of programs linked by FYI's "parent ID" field; and (ii) duplicative programs based on title.
- (5) Figure 1 shows the results of my analysis.

Figure 1. Number of unique non-network programs and series by year

Year	Number of distinct programs
2010	34,832
2011	36,174
2012	36,343
2013	35,009

- (6) I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 16 th day of March, 2020.



Christopher J. Bennett, PhD

¹ FYI's parent ID field links episodic content of series, sports, and specials.

EXHIBIT C

Table C-8: Poisson Regression Results, non-WGNA stations, 2013

Distant Viewers	Coefficient Estimate	Robust Standard Error	Z-score	95% Confidence Interval	
Local Ratings	8.8211	0.0255	346.01	8.7712	8.8711
Log of Market Size	0.5122	0.0009	585.84	0.5105	0.5139
Time of Day (Quarter Hour)					
2	-0.0924	0.0119	-7.79	-0.1157	-0.0692
3	-0.2050	0.0122	-16.85	-0.2289	-0.1812
4	-0.3452	0.0125	-27.53	-0.3698	-0.3206
5	-0.3778	0.0124	-30.43	-0.4022	-0.3535
6	-0.5109	0.0129	-39.72	-0.5361	-0.4857
7	-0.5026	0.0130	-38.77	-0.5280	-0.4772
8	-0.5892	0.0131	-45.09	-0.6148	-0.5636
9	-0.6150	0.0135	-45.63	-0.6414	-0.5886
10	-0.6549	0.0136	-48.02	-0.6817	-0.6282
11	-0.6697	0.0138	-48.44	-0.6968	-0.6426
12	-0.7955	0.0142	-55.89	-0.8234	-0.7676
13	-0.7315	0.0138	-53.11	-0.7585	-0.7045
14	-0.7857	0.0140	-56.29	-0.8131	-0.7584
15	-0.9017	0.0145	-62.16	-0.9301	-0.8733
16	-0.9218	0.0146	-63.33	-0.9504	-0.8933
17	-0.8874	0.0148	-59.99	-0.9164	-0.8584
18	-0.8742	0.0150	-58.17	-0.9037	-0.8448
19	-0.9574	0.0151	-63.57	-0.9870	-0.9279
20	-0.8708	0.0147	-59.07	-0.8997	-0.8419
21	-0.8518	0.0149	-57.16	-0.8810	-0.8226
22	-0.7756	0.0147	-52.86	-0.8044	-0.7468
23	-0.7272	0.0146	-49.85	-0.7558	-0.6986
24	-0.5224	0.0137	-38.20	-0.5492	-0.4956
25	-0.1332	0.0124	-10.70	-0.1576	-0.1088
26	-0.0906	0.0123	-7.35	-0.1148	-0.0665
27	-0.2644	0.0131	-20.26	-0.2900	-0.2388
28	-0.2288	0.0129	-17.78	-0.2541	-0.2036
29	0.0595	0.0124	4.81	0.0352	0.0837
30	0.2207	0.0119	18.59	0.1974	0.2440
31	0.2404	0.0119	20.26	0.2172	0.2637
32	0.2652	0.0117	22.66	0.2423	0.2881
33	0.1430	0.0119	12.05	0.1198	0.1663
34	0.2536	0.0117	21.70	0.2307	0.2765
35	0.2410	0.0117	20.59	0.2181	0.2640
36	0.2622	0.0116	22.67	0.2395	0.2849
37	0.3056	0.0108	28.39	0.2845	0.3267
38	0.3487	0.0108	32.42	0.3276	0.3698
39	0.3322	0.0108	30.80	0.3111	0.3533
40	0.3566	0.0107	33.28	0.3356	0.3776
41	0.2701	0.0111	24.28	0.2483	0.2919
42	0.1222	0.0116	10.54	0.0994	0.1449
43	0.0493	0.0118	4.17	0.0261	0.0725
44	0.0205	0.0121	1.70	-0.0032	0.0441
45	0.0029	0.0122	0.24	-0.0209	0.0268
46	-0.0084	0.0124	-0.68	-0.0327	0.0159
47	0.0657	0.0121	5.44	0.0420	0.0894
48	0.0994	0.0120	8.26	0.0758	0.1230

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49	0.2911	0.0111	26.16	0.2693	0.3129
50	0.3344	0.0109	30.56	0.3129	0.3558
51	0.2702	0.0114	23.70	0.2478	0.2925
52	0.2898	0.0113	25.60	0.2676	0.3120
53	0.4669	0.0109	42.70	0.4455	0.4883
54	0.4370	0.0112	38.89	0.4150	0.4590
55	0.4791	0.0112	42.88	0.4572	0.5010
56	0.4833	0.0111	43.35	0.4614	0.5051
57	0.4215	0.0112	37.79	0.3997	0.4434
58	0.4076	0.0113	36.07	0.3855	0.4298
59	0.3957	0.0116	34.13	0.3730	0.4184
60	0.4150	0.0114	36.47	0.3927	0.4373
61	0.5697	0.0106	53.80	0.5489	0.5904
62	0.5801	0.0106	54.50	0.5592	0.6009
63	0.6202	0.0105	58.95	0.5996	0.6408
64	0.6653	0.0104	64.14	0.6450	0.6857
65	0.6220	0.0103	60.48	0.6018	0.6421
66	0.5860	0.0104	56.27	0.5656	0.6064
67	0.6427	0.0104	61.89	0.6223	0.6630
68	0.6411	0.0103	62.49	0.6210	0.6612
69	0.5604	0.0102	54.74	0.5403	0.5805
70	0.4718	0.0104	45.56	0.4515	0.4920
71	0.4957	0.0104	47.45	0.4753	0.5162
72	0.6109	0.0102	60.07	0.5910	0.6309
73	0.6757	0.0099	68.34	0.6563	0.6951
74	0.6779	0.0099	68.35	0.6585	0.6974
75	0.8152	0.0099	82.07	0.7957	0.8347
76	0.9401	0.0097	96.85	0.9210	0.9591
77	0.9850	0.0094	104.55	0.9666	1.0035
78	0.9909	0.0094	105.08	0.9725	1.0094
79	1.0851	0.0093	117.19	1.0669	1.1032
80	1.1782	0.0092	128.09	1.1601	1.1962
81	1.5260	0.0091	167.80	1.5082	1.5439
82	1.4119	0.0092	153.23	1.3938	1.4299
83	1.4469	0.0092	157.23	1.4288	1.4649
84	1.4422	0.0092	156.76	1.4242	1.4603
85	1.4957	0.0092	162.27	1.4776	1.5137
86	1.3692	0.0093	147.20	1.3510	1.3874
87	1.3278	0.0093	142.70	1.3096	1.3460
88	1.2639	0.0093	135.18	1.2456	1.2822
89	1.2072	0.0094	128.55	1.1888	1.2256
90	1.0214	0.0096	106.86	1.0026	1.0401
91	0.9167	0.0097	94.61	0.8978	0.9357
92	0.7760	0.0099	78.27	0.7566	0.7955
93	0.6345	0.0099	63.88	0.6150	0.6539
94	0.4577	0.0102	44.90	0.4377	0.4777
95	0.3402	0.0106	31.96	0.3194	0.3611
96	0.1747	0.0111	15.73	0.1530	0.1965
Program Type					
CARTOON	-0.7102	0.0051	-140.20	-0.7201	-0.7002
CHILDREN'S SHOW	-0.6158	0.0059	-104.26	-0.6274	-0.6042
CHILDREN'S SPECIAL	-0.5889	0.0188	-31.28	-0.6258	-0.5520
DAYTIME SOAP	0.0606	0.0073	8.29	0.0463	0.0749
FINANCE	-0.8547	0.0082	-104.55	-0.8707	-0.8387
FIRST-RUN SYNDICATION	-27.5910	0.0381	-724.11	-27.6657	-27.5163
GAME SHOW	-0.1078	0.0072	-15.04	-0.1218	-0.0937
HEALTH	-1.2514	0.0138	-90.92	-1.2783	-1.2244
HOBBIES & CRAFTS	-1.0441	0.0250	-41.77	-1.0931	-0.9951

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INSTRUCTIONAL	-0.3223	0.0059	-54.93	-0.3338	-0.3108
MINI-SERIES	-0.4578	0.0144	-31.71	-0.4860	-0.4295
MOVIE	-0.2099	0.0062	-33.71	-0.2221	-0.1977
MUSIC	-0.3412	0.0062	-55.47	-0.3533	-0.3292
MUSIC SPECIAL	-0.4264	0.0055	-77.60	-0.4371	-0.4156
NETWORK SERIES	-0.1576	0.0046	-34.21	-0.1667	-0.1486
NEWS	-0.3205	0.0047	-67.61	-0.3298	-0.3112
OTHER	-0.9594	0.0056	-171.76	-0.9704	-0.9485
PELICULA	0.3329	0.0065	51.38	0.3202	0.3456
PLAYOFF SPORTS	0.6979	0.0108	64.79	0.6768	0.7190
PSEUDO-SPORTS	-27.1547	0.0137	-1980.36	-27.1816	-27.1279
PUBLIC AFFAIRS	-0.5487	0.0063	-86.48	-0.5611	-0.5362
RELIGIOUS	-1.4823	0.0101	-146.94	-1.5021	-1.4625
SPECIAL	-0.5471	0.0051	-107.83	-0.5570	-0.5371
SPORTING EVENT	0.6993	0.0113	62.05	0.6772	0.7214
SPORTS ANTHOLOGY	-0.2497	0.0571	-4.37	-0.3616	-0.1378
SPORTS-RELATED	0.0961	0.0110	8.74	0.0746	0.1177
SYNDICATED	-0.1357	0.0044	-30.82	-0.1443	-0.1270
TALK SHOW	-0.2331	0.0048	-48.65	-0.2425	-0.2237
TEAM VS. TEAM	1.2009	0.0065	185.24	1.1882	1.2136
TV MOVIE	-0.9298	0.0278	-33.48	-0.9842	-0.8754
Constant	0.1688	0.0139	12.15	0.1416	0.1960

EXHIBIT D

Figure 12: Relationship between Gracenote's program type and Dr. Gray's categorization (2010 broadcasts)

Gracenote categorization	Gray categorization				
	Commercial	Devotional	Program supplier	JSC	Total
Cartoon	0	1	14,536	0	14,537
Children's show	0	0	10,137	0	10,137
Children's special	0	0	772	0	772
Daytime soap	0	0	29,013	0	29,013
Finance	347	0	2,324	0	2,671
First-run syndication	0	0	2,029	0	2,029
Game show	0	0	32,417	0	32,417
Health	68	0	1,080	0	1,148
Hobbies & crafts	23	0	63	0	86
Instructional	1	0	3,126	0	3,127
Mini-series	0	0	69	0	69
Movie	0	1	6,585	0	6,586
Music	102	0	2,223	0	2,325
Music special	25	0	585	0	610
Network series	0	0	43,825	0	43,825
News	133,301	52	38,424	0	171,777
Other	11,266	14	112,926	0	124,206
Película	0	0	430	0	430
Playoff sports	14	0	94	1,182	1,290
Pseudo-sports	0	0	263	0	263
Public affairs	2,424	5	1,625	0	4,054
Religious	0	9,178	9	0	9,187
Special	1,296	331	3,215	0	4,842
Sporting event	0	0	10,258	3	10,261
Sports anthology	1	0	1,468	0	1,469
Sports-related	3,750	0	9,967	0	13,717
Syndicated	0	0	260,814	0	260,814
Talk show	0	1,206	132,331	0	133,537
Team vs. Team	8	0	103	4,726	4,837
TV movie	0	0	421	0	421
Total	152,626	10,788	721,132	5,911	890,457

- (44) This figure shows that Gracenote consistently categorizes programming from multiple claimant groups within the same program-type classification. For example, the figure shows CTV programming is always grouped together with another claimant's programming.²⁹

²⁹ There is a discrepancy between Dr. Gray's Table 5 and my own Figure 8 (from my March 22, 2019 report), both of which show claimant shares of compensable minutes of programming. It appears that the bulk of the difference is driven by the treatment of a number of news programs that aired on multiple broadcast stations. I included these in the Program Suppliers category while Dr. Gray included them in the CTV category.

Appendix H. Relationship between Gracenote's program type and Dr. Gray's categorization

Figure 45: Relationship between Gracenote's program type and Dr. Gray's categorization (2011 broadcasts)

Program type	Gray categorization				Total
	Commercial	Devotional	Program supplier	JSC	
CARTOON	0	0	15,643	0	15,643
CHILDREN'S SHOW	0	0	10,874	0	10,874
CHILDREN'S SPECIAL	0	0	689	0	689
DAYTIME SOAP	0	0	27,086	0	27,086
FINANCE	390	0	2,913	0	3,303
FIRST-RUN SYNDICATION	0	0	603	0	603
GAME SHOW	0	0	38,177	0	38,177
HEALTH	119	0	1,176	0	1,295
HOBBIES & CRAFTS	4	0	18	0	22
INSTRUCTIONAL	2	0	3,883	0	3,885
MINI-SERIES	0	0	4	0	4
MOVIE	0	1	6,814	0	6,815
MUSIC	70	1	3,358	0	3,429
MUSIC SPECIAL	17	4	591	0	612
NETWORK SERIES	0	0	53,229	0	53,229
NEWS	154,271	0	44,044	0	198,315
OTHER	11,211	52	108,162	0	119,425
PLAYOFF SPORTS	11	0	93	1,650	1,754
PSEUDO-SPORTS	20	0	87	0	107
PUBLIC AFFAIRS	2,621	1	2,552	0	5,174
RELIGIOUS	0	11,166	0	0	11,166
SPECIAL	1,190	244	2,742	0	4,176
SPORTING EVENT	13	0	9,578	25	9,616
SPORTS ANTHOLOGY	0	0	2,067	0	2,067
SPORTS-RELATED	3,123	0	10,101	21	13,245
SYNDICATED	0	0	292,602	0	292,602
TALK SHOW	0	1,529	157,337	0	158,866
TEAM VS. TEAM	5	0	240	4,853	5,098
TV MOVIE	0	0	291	0	291
TOTAL	173,067	12,998	794,954	6,549	987,568

Figure 46: Relationship between Gracenote's program type and Dr. Gray's categorization (2012 broadcasts)

Program type	Gray categorization				
	Commercial	Devotional	Program supplier	JSC	Total
CARTOON	0	0	11,832	0	11,832
CHILDREN'S SHOW	0	0	11,895	0	11,895
CHILDREN'S SPECIAL	0	0	681	0	681
DAYTIME SOAP	0	0	18,838	0	18,838
FINANCE	376	0	5,667	0	6,043
GAME SHOW	0	0	39,587	0	39,587
HEALTH	73	0	993	0	1,066
INSTRUCTIONAL	28	0	3,529	0	3,557
MINI-SERIES	0	0	52	0	52
MOVIE	0	0	7,462	0	7,462
MUSIC	128	9	3,762	0	3,899
MUSIC SPECIAL	26	7	657	0	690
NETWORK SERIES	0	0	58,269	0	58,269
NEWS	147,506	0	44,922	0	192,428
OTHER	12,455	18	107,018	0	119,491
PLAYOFF SPORTS	24	0	0	1,770	1,794
PSEUDO-SPORTS	21	0	256	0	277
PUBLIC AFFAIRS	2,744	0	226	0	2,970
RELIGIOUS	0	13,027	6	0	13,033
SPECIAL	893	268	2,799	0	3,960
SPORTING EVENT	1	0	6,644	63	6,708
SPORTS ANTHOLOGY	0	0	1,823	0	1,823
SPORTS-RELATED	3,103	0	12,413	0	15,516
SYNDICATED	0	0	289,112	0	289,112
TALK SHOW	0	1,231	169,574	0	170,805
TEAM VS. TEAM	11	0	190	4,956	5,157
TV MOVIE	0	0	200	0	200
TOTAL	167,389	14,560	798,407	6,789	987,145

Figure 47: Relationship between Gracenote's program type and Dr. Gray's categorization (2013 broadcasts)

Program type	Gray categorization				
	Commercial	Devotional	Program supplier	JSC	Total
CARTOON	0	0	10,842	0	10,842
CHILDREN'S SHOW	0	0	7,926	0	7,926
CHILDREN'S SPECIAL	0	0	507	0	507
DAYTIME SOAP	0	0	16,631	0	16,631
FINANCE	680	0	4,781	0	5,461
GAME SHOW	0	0	35,474	0	35,474
HEALTH	41	0	1,392	0	1,433
INSTRUCTIONAL	0	0	3,126	0	3,126
MOVIE	0	0	5,944	0	5,944
MUSIC	110	10	3,045	0	3,165
MUSIC SPECIAL	25	0	763	0	788
NETWORK SERIES	0	0	54,389	0	54,389
NEWS	131,685	0	41,694	0	173,379
OTHER	9,792	2	100,284	0	110,078
PLAYOFF SPORTS	8	0	42	1,521	1,571
PSEUDO-SPORTS	0	0	299	0	299
PUBLIC AFFAIRS	1,954	0	610	0	2,564
RELIGIOUS	0	10,371	321	0	10,692
SPECIAL	910	310	2,909	0	4,129
SPORTING EVENT	0	0	4,922	17	4,939
SPORTS ANTHOLOGY	0	0	1,666	0	1,666
SPORTS-RELATED	3,046	0	10,255	0	13,301
SYNDICATED	0	92	247,728	0	247,820
TALK SHOW	0	969	154,849	0	155,818
TEAM VS. TEAM	0	0	263	4,420	4,683
TV MOVIE	0	0	131	0	131
TOTAL	148,251	11,754	710,793	5,958	876,756